QUESTIONS PRESENTED

1. Does the *Treaty With the Yakimas*, 12 Stat. 951, prohibit the state taxation of the reservation fee lands owned by the Yakima Nation and its members within the Yakima Indian Reservation?

2. Is the per se rule prohibiting state taxation of reservation Indians and their lands circumvented by Section 6 of the General Allotment Act (25 U.S.C. 349) even though allotment and assimilation policies popular at the turn of the last Century have since been completely repudiated by Congress?

3. Does the Washington Enabling Act continue to prohibit state taxation of reservation fee land which is owned by tribal members who have not severed their tribal affiliations?

4. Does the per se rule prohibiting state taxation of reservation Indians and their lands apply to an excise tax the state seeks to impose on the occurrence of a sale of reservation fee lands?

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In The

Supreme Court of the United States

October Term, 1991

COUNTY OF YAKIMA and DALE A. GRAY,
Yakima County Treasurer,

Petitioners,

v.

CONFEDERATED TRIBES AND BANDS
OF THE YAKIMA INDIAN NATION,

Respondent.

CONFEDERATED TRIBES AND BANDS
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Cross-Petitioner,

v.

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On Writs Of Certiorari
To The United States Court Of
Appeals For The Ninth Circuit

BRIEF OF RESPONDENT/CROSS-PETITIONER

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Nos. 90-408 and 90-577
CONSOLIDATED

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CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES INVOLVED

In addition to the statute set forth in the Brief of the Petitioners/Cross-Respondents, the following Constitutional provisions, treaties and statutes are involved.

A. *Constitutional Provisions:* This case involves Article I, Section 8, Clause 3:

> "To regulate commerce with foreign nations and among the several states, and with the Indian tribes."

It also involves Article VI, Clause 2:

> "This Constitution; and the Laws of the United States which shall be made in Pursuance thereof; all treaties made, or which shall be made under the Authority of the United States, shall be the supreme law of the land."

B. *State Constitutional Provisions:* This case involves Article XXVI of the Constitution of the State of Washington, which is identical to the Washington Enabling Act, 25 Stat. 656 which provides in pertinent part as follows:

> "Does agree and declare that they forever disclaim all right and title . . . to all lands lying within said limits owned or held by an Indian or Indian tribe; and . . . said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States . . . and that no taxes shall be imposed by the state on lands or properties therein belonging to or which may hereafter be purchased by the United States or reserved for use; provided, that nothing in this ordinance shall preclude the state from taxing as other lands are taxed, any lands owned or held by any Indian who has

> severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and accept such lands as may have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation, which exemption shall continue so long and to such extent as such act of Congress may prescribe."

C. *Treaties Involved:* This case involves the *Treaty With the Yakimas*, 12 Stat. 951.

D. *Statutes Involved:* In addition to 25 U.S.C. 349, this case involves 18 U.S.C. 1151:

> "Except as otherwise provided in Sections 1154 and 1156 of this title, the term 'Indian Country' as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights of way running through said reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights of way running through the same."

STATEMENT OF THE CASE

A. *Historical Introduction:* The Confederated Tribes and Bands of the Yakima Indian Nation entered into a Treaty with the United States in 1855. This Treaty, the *Treaty With the Yakimas*, was ratified by the United

States Senate, and signed by President James Buchanan in 1859, 12 Stat. 951. In the *Treaty*, the Yakima Nation ceded 10.8 million acres of land to the United States. This ceded land now constitutes the bulk of Central Washington. [J.A. 24]

In the *Treaty*, the Yakima Nation reserved, for its *exclusive use and benefit*, approximately 1.3 million acres of land which is now known as the Yakima Indian Reservation. (Article III of *Treaty*, 12 Stat. 951). The majority of the reservation lands are located in what is now Yakima County which came with Washington's statehood in 1889. [J.A. 43]

The *Treaty With the Yakimas* also guaranteed to the Yakima Nation that the Tribe was reserving its right to self-government, to make its own laws and be ruled by them. The Yakima Nation has continued its tribal government from the time of the *Treaty* to the present and its governing body continues to be recognized by the United States. The Yakima Nation is not a stranger to this Court, having recently presented arguments in a dispute with Yakima County over zoning jurisdiction on the Yakima Indian Reservation in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 208, 106 L.Ed.2d 343 (1989).

B. ***Allotments on the Yakima Indian Reservation:*** Because this case involves real property allotments, and a construction of the General Allotment Act of 1887, 24 Stat. 388, 25 U.S.C. 331, *et seq.*, the Yakima Nation believes a brief review of the allotment process on the Yakima Indian Reservation may be helpful.

Allotment of Indian reservation lands was an assimilationist policy prevalent in the latter portion of the Nineteenth Century. The process of allotment and assimilation was deemed important in order to absorb the Indian into the mainstream of American life and destroy the "savagery" represented by tribal autonomy. The General Allotment Act of 1887 culminated years of debate on allotment proposals. It was the prevailing view of Congress that the destruction of the tribal system was inevitable. Allotment was considered central to the civilization of Indians because of the dramatic difference in white concepts of individual property ownership as opposed to the Indian concept of tribal, nonindividual, property management. In summary, the purpose of the General Allotment Act was to end tribal organization and absorb the Indian people into the American mainstream, eventually subjecting them to all state and local jurisdiction.[1]

On the Yakima Indian Reservation, it is clear that the primary source of authority for allotments to the Yakima people was the General Allotment Act. The majority of land allotted on the Yakima Indian Reservation was accomplished prior to the adoption of the Burke Act, 34 Stat. 182, which amended 25 U.S.C. 349. By 1904, nearly 300,000 acres of land had been allotted to Yakima members.[2]

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[1] See *Readjustment of Indian Affairs: Hearings on H.R. 7902 Before House Comm. on Indian Affairs*, 73rd Cong. 2d Sess. 428-89 (1934), reprinted as D. Otis, the Dawes Act and the Allotment of Indian Lands (F. Prucha, Ed.) (University of Oklahoma Press, 1973). Also see F. Cohen, *Handbook of Federal Indian Law* (1982 Ed., Chap. 2, Sec. C.2)

[2] See Senate Rep. No. 2738, 58th Congress, 3d Sess. 4. (1904)

Allotment of lands to Yakima Indians was not the only manner in which reservation lands were broken into individual parcels and fee patents issued. The corollary to the assimilationist policy of allotment was the policy of reservation surplus land sales. Congress passed a surplus land statute applicable to the Yakima Indian Reservation in 1904, 33 Stat. 595. This surplus land act was somewhat similar to the surplus land act at Colville which this Court considered in *Seymour v. Superintendent*, 368 U.S. 351 (1962) and did not diminish the reservation. The record below does not contain information as to how much, if any, land passed out of trust pursuant to the surplus land act.[3]

[3] The judgment of the District Court was rendered upon cross-motions for summary judgment. The District Court determined that for purposes of the Court's decision there were no material facts needing further investigation. Accordingly, no investigation was made concerning the fee lands at issue to determine the manner in which the property passed out of a trust status and the statutory authority therefor. There were a variety of other authorities allowing reservation lands to pass out of trust to a fee patent. In addition to 25 U.S.C. 349, fee patents may have possibly been obtained pursuant to 25 U.S.C. 320, 23 U.S.C. 348, 25 U.S.C. 379, 25 U.S.C. 404 and 23 U.S.C. 405. In spite of these authorities and the Surplus Land Act of 1904, the Yakima Reservation remained intact for the most part as the Yakimas fought bitterly against the opening of their reservation. Their strong opposition in part defeated proposed legislation known as the Jones Bill of March 6, 1906, which would have required Yakima allottees to sell 60 acres of their 80 acre allotment to pay the cost of irrigation canal construction. McWhorter, *The Crimes Against the Yakimas*, Republic Printing (1913).

C. ***The Yakima Indian Reservation at Present:*** The Yakima Indian Reservation continues to encompass the lands described in Article II of the *Treaty With the Yakimas*. In fact, the only modern change to the recognized boundaries of the Yakima Indian Reservation was an expansion which occurred in 1972 when the sacred Mt. Adams was returned to the Yakima Tribe by the United States by Executive Order No. 11,670, 37 Fed. Reg. 10,431. Of the 1.3 million acres within the reservation, 1.04 million acres or 80% remain trust lands, most of which is unallotted timber and range lands owned by the Yakima Tribe. [*Brendale*, 106 L.Ed.2d 343, 353] The trust lands of the reservation are not subject to state property taxation. The remaining 260,000 acres is fee land. Less than 1% of the fee land is owned by the Tribe and/or its members. [J.A. 37]

There were approximately 7,600 members of the Yakima Nation when this litigation was commenced in the District Court.[4] [J.A. 37] The majority of tribal members live on the Yakima Indian Reservation. [J.A. 37] The government of the Yakima Nation plays a large role on

[4] The suggestion by Yakima County in its Brief at p. 31 that the Yakima Nation might relax its blood-quantum standard for enrollment with the purpose to expand the number of members and increase the number of persons with tax immunity is preposterous. The Yakima Nation jealously protects the integrity of its membership rolls to insure only Yakima people receive per-capita distributions of tribal income. Furthermore, Yakima blood-quantum requirements have been established by Congress at 25 U.S.C. 601-607, 60 Stat. 968, legislative enactments of which Yakima County is apparently unaware.

the reservation. In addition to the grants from and contracts with the United States Government, the Yakima Nation spends in excess of $5,000,000.00 of its tribal income annually to fund programs of the tribal government. [J.A. 19] Tribal income is derived primarily from the sale of timber and the leasing of unallotted lands. [J.A. 19] The Yakima Nation spends nearly as much as Yakima County does for law enforcement on the reservation even though tribal membership constitutes approximately 20% of the reservation population. [J.A. 38] Each member of the Yakima Nation contributes approximately $700.00 per year to fund the cost of the active tribal government, no distinction being made between tribal members living on fee lands and those living on trust lands. [J.A. 20, 21]

As was described in *Brendale*, 106 L.Ed.2d 343, 353, 354, 368, 369, the Yakima Indian Reservation is divided into a restricted or "closed" area and an "open" area. The restricted area consists of approximately 807,000 acres of forest and range lands. The Yakima Nation prohibits permanent structures in the restricted area. Members of the Yakima Nation residing on the reservation live in the "open area", primarily on trust property. The "open area" portion of the reservation is mostly irrigated, agricultural land. The open area has four small towns, Toppenish, Wapato, Harrah and White Swan which have a combined population of approximately 10,000.

In recent times, members of the Yakima Nation have begun to acquire fee property for a place to live. Approximately 104 tribal members were identified as owning 139 fee land parcels within the Yakima Indian Reservation, which parcels were generally homesites and averaged

about 10 acres in size. [J.A. 37] Tribal members owning and living on fee lands within the reservation was at the root of this present controversy.[5]

D. ***The Present Conflict:*** The issues being presented to this Court in this case were prompted by the inability of a large number of tribal members to pay the County real estate taxes attributable to their reservation fee lands. In November, 1987, Yakima County had scheduled tax foreclosure sales on 37 parcels of reservation fee lands owned by 31 different tribal members. Nearly one-third of all tribal members owning fee land, were at least three years behind on property taxes. [J.A. 8-10] In Washington, real estate taxes must be three years delinquent before the County can foreclose on the property and sell it at a tax sale.[6]

In response to the plight of its members, none of whom had severed tribal affiliations, [J.A. 12] the Yakima Nation brought an action in the United States District Court for the Eastern District of Washington seeking a declaratory judgment and injunctive relief, to invalidate the County's imposition and collection of real estate taxes on fee lands of the Tribe and of tribal members. [J.A. 3-5]

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[5] Another consequence of the District Court's granting summary judgment is that no information or data was presented to the court as to when members of the Yakima Nation began to venture onto fee lands. Yakima County's brief implies that tribal members have been paying real estate taxes on fee lands for decades. This implication is disputed by the Yakima Nation which contends that land ownership in fee by tribal members is a circumstance that has developed to an appreciable degree in recent times.

[6] R.C.W. 84.64.030

At the same time, the Tribe added a second cause of action seeking to invalidate the County's assessment and collection of the real estate sales excise tax from tribal members and the tribe on sales of fee lands within the reservation. [J.A. 6] Yakima County had previously refused to recognize that the tribe and tribal members were immune from this excise tax on such sales.

E. ***The Decisions Below:*** Shortly after the lawsuit was commenced, the District Court entered a temporary restraining order restraining Yakima County from selling the 37 parcels of fee land for the 1983 taxes. The District Court then considered cross-motions for summary judgment. [J.A. 17, 25] After considering the undisputed evidence which the parties submitted by both affidavit and by stipulation, the Honorable Alan A. McDonald ruled in favor of the Yakima Nation, that Yakima County lacked requisite jurisdiction to impose its property taxes upon the fee lands owned by members of the Yakima Nation, and issued a permanent injunction. [Yak. Co. Pet. 34a-39a] Judge McDonald considered the County's argument that 25 U.S.C. 349 constituted Congressional consent to such taxation. However, Judge McDonald was unable to find a meaningful distinction between the contentions of Yakima County and those of the State of Montana in *Moe v. Salish and Kootenai Tribes*, 425 U.S. 463 (1975). The rejection of 25 U.S.C. 349 and of *Goudy v. Meath*, 203 U.S. 146 (1906) by this Court in *Moe* persuaded Judge McDonald that taxation of tribal and member-owned fee lands was likewise inconsistent with modern Congressional policy and not permissible.

The County appealed Judge McDonald's decision and judgment to the Ninth Circuit Court of Appeals.

After briefing and argument, the Ninth Circuit, in an unprecedented ruling, determined that a balancing test was the measure against which this issue should be contested in light of this Court's decision in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, supra.* The Ninth Circuit chose not to follow *Moe*, failed to give even lip service to *Battese v. Apache County*, 129 Ariz. 295, 630 P.2d 1029 (1981), and rejected this Court's views as to the applicability of the Congressional definition of "Indian Country" found at 18 U.S.C. 1151. The Ninth Circuit reversed the District Court as to the property tax issue, remanding the case to Judge McDonald to consider whether the County's taxation impacted in a demonstrably serious manner the political integrity, economic security or the health and welfare of the Yakima Tribe. [Yak. Co. Pet. 1a-29a]

As to the second issue, the Ninth Circuit affirmed the District Court ruling that the real estate sales excise tax could not be imposed upon the tribe and tribal members on sales of reservation fee lands. Even though the result was correct, the Ninth Circuit Opinion was less than clear as to what authority was being relied upon to invalidate the excise tax on sales by tribal members. [Yak. Co. Pet. 29a-30a]

Petitions for Rehearing were filed by both the County and the Tribe and were denied by the Ninth Circuit. Realizing the Tribe could demonstrate the serious impact of the tax[7], Yakima County petitioned this Court for a

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[7] The Ninth Circuit Opinion acknowledged that the Yakima Nation had provided evidence that such taxation would affect it in a demonstrably serious way. See Opinion at 903 F.2d 1207 at 1218 (Yak. Co. Pet., p. 28a).

Writ of Certiorari. The Yakima Nation thereafter filed its Cross-Petition with this Court in order to argue and defend its position that the District Court judgment was correct and should be reinstated.

SUMMARY OF ARGUMENT

The Yakima Nation is a sovereign Indian tribe with Treaty guaranteed rights by virtue of the *Treaty With the Yakimas*, 12 Stat. 951. In this *Treaty*, the United States promised the Yakima Nation that the lands of the Yakima Reservation would be for the exclusive use and benefit of the Yakima Nation. The abrogation of this *Treaty* provision may have been contemplated by the General Allotment Act but it did not occur as this assimilation legislation was repudiated by Congress in 1934.

The Yakima Nation contends that this Court has stated a per se rule which provides that state taxation of reservation Indians and their lands is prohibited absent express consent by Congress. Allotment era legislation, which has been completely rejected by Congress does not serve as express consent to the taxation of reservation fee land owned by the Yakima Nation and its members. Under the authority of *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1979), allotment and assimilation legislation such as 25 U.S.C. 349 can no longer be relied upon by states as jurisdictional authority to tax Indian-owned fee lands within reservations.

Furthermore, the Washington Enabling Act prohibits state property taxation of reservation fee lands owned by tribal members who have not severed tribal affiliations.

25 U.S.C. 349 does not constitute consent from Congress permitting the State to tax a member's reservation fee lands who has not severed tribal relations because this statute, as part of the General Allotment Act, anticipated that tribal organizations would be destroyed and the Indian reservations would be dissipated.

Finally, the Yakima Nation argues that the state excise tax sought to be imposed upon the Yakima Nation and its members for the sale of reservation fee lands is unlawful under the per se rule that states have no jurisdiction to tax reservation Indians and their lands.

ARGUMENT

I. THE YAKIMA INDIAN NATION IS A TREATY SOVEREIGN WITH INHERENT POWERS OVER ITS PEOPLE AND LANDS. THE PROMISE FROM THE UNITED STATES THAT THE YAKIMA RESERVATION WAS SET ASIDE FOR THE EXCLUSIVE USE AND BENEFIT OF THE YAKIMA PEOPLE HAS NOT BEEN ABROGATED.

The *Treaty With the Yakimas*, 12 Stat. 951, sets forth the areas of land ceded to the United States and describes the land reserved by the Yakima Nation for its "exclusive use and benefit". This Court has interpreted and explained the legal effect of similar Treaty language. In *Williams v. Lee*, 358 U.S. 217, 221 (1958), this Court stated the following:

> "In return for [Indian] promises to keep peace, this treaty 'set apart' for their *permanent* home a portion of what has been their native country . . . " (emphasis supplied)

The *Treaty With the Yakimas* was the subject of this Court's attention in *United States v. Winans*, 198 U.S. 371 (1905). Here, this Court said:

> "And we have said we will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection and counterpoise the inequality which looks only to the substance of the rights, without regard to technical rules'."

Winans, at 380.

> "In other words, the treaty was *not a grant of rights* to the Indian, but *a grant of rights from them, a reservation of those not granted.*" (emphasis supplied)

Winans, at 381.

In addition to having the promise of the *exclusive use and benefit* of their reservation, the *Treaty With the Yakimas* also provided:

> *"Nor shall any white man,* excepting those in the employment of the Indian Department, *be permitted to reside upon said reservation* without permission of the tribe and the superintendent and agent." (emphasis supplied)

If the Yakima *Treaty* was the dispositive document, the resolution of this issue would be far less complicated as there can be little doubt that if this Treaty was construed as the Indians understood it, state property taxation of member-owned fee land would not be permitted.

Even though the *Treaty With the Yakimas* may not be the complete answer to this question, it is important and

should be considered carefully. *McClanahan v. Arizona Tax Comm.*, 411 U.S. 164, 174 (1973). An Indian treaty is essentially a contract between two sovereigns. *Washington v. Fishing Vessel Ass'n.*, 443 U.S. 658, 675 (1979). The United States Constitution provides at Article VI, Clause 2:

> "This Constitution; and the Laws of the United States which shall be made in Pursuance thereof; *all Treaties made, or which shall be made* under the Authority of the United States, *shall be the supreme law of the land.*" (emphasis supplied)

Indian Treaties and rights thereunder will not be considered abrogated by legislation unless there is a clear and specific showing in the later legislation that abrogation was intended. *Menominee Tribe v. United States*, 391 U.S. 404 (1968). Congress may have the power to abrogate an Indian Treaty, though "such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interests of the country and the Indians themselves, that it should do so. . . . That in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians". *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903).

The present Congressional respect for Indian treaties and the rights guaranteed to Indian tribes is reflected by the 1988 reaffirmation of and amendment to 25 U.S.C. 71, 102 Stat. 3641. This statute provides, in part:

> " . . . but no obligation of any treaty lawfully made and ratified with any such Indian Nation or tribe prior to March 3, 1871, shall be invalidated or impaired."

This legislation is significant because it restates a statute passed in 1871, demonstrating Congressional embracement of the Treaty rights of Indian people, some 50 years after the end of the allotment and assimilation era.

The Yakima Nation submits that the guarantee that the reservation lands would be for the Tribe's "exclusive use and benefit" and would always be the *permanent* home of the Yakima people, where no white man could enter the reservation without their consent, prohibits the state taxation at issue. Although the allotment and assimilation legislation may have been toward abrogation of these Treaty rights, the allotment and assimilation process was halted in 1934 and was never completed. The complete abrogation of many treaty rights did not occur. As to members of the Yakima Nation, the Treaty rights concerning Yakima Reservation land should be intact.[8] The Yakima Nation urges this Court to give appropriate consideration to the Treaty document.

II. THERE EXISTS A FEDERAL TRADITION PROHIBITING STATE TAXATION OF RESERVATION INDIANS AND LANDS.

A. Congress Is Vested With Exclusive Jurisdiction To Regulate Indian Tribes.

The framers of the Constitution placed the responsibility for Indian tribes with Congress, not with states. Article I, Section 8, Clause 3 provides that Congress is:

[8] The Yakima Nation recognizes that with respect to the *non-members* residents of the Yakima Indian Reservation, Treaty rights and promises are viewed from a much different perspective. This Court's decision in *Brendale* remains fresh to the Yakima Nation and we make no claims or assertions as to non-member owned fee lands in this case.

> "To regulate commerce with foreign nations and among the several states, and with the Indian tribes."

Historical examples this Congressional responsibility include the Trade and Intercourse Act of 1796, ch. 30, 1 Stat. 469; and the Trade and Intercourse Act of 1834, ch. 161, 4 Stat. 730, 25 U.S.C. 180.

This Court has continuously recognized the federal government's exclusive power to provide Indian legislation. In *Lone Wolf v. Hitchcock, supra,* this Court stated the concept that Congressional power over Indian affairs was plenary to the point that Indian Treaty rights could be abrogated by Congress. The doctrine of the plenary authority of Congress over Indian matters has consistently been recognized by this Court throughout this century. *Delaware Tribal Business Comm. v. Weeks,* 430 U.S. 73 (1977).

Even though Congress was vested with plenary authority over Indian matters, this Court has required Congress to temper its authority with a trust responsibility to Indian tribes. In *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1 (1831), Mr. Chief Justice Marshall concluded that Indian tribes "may be denominated domestic dependent nations . . . in a state of pupilage" and that "their relation to the United States resembles that of a ward to his guardian". *Id* at 17. The fulfillment by Congress of this trust responsibility toward Indian people serves as a constitutional basis for Congressional legislation singling out Indians for particular treatment. *Morton v. Mancari,* 417 U.S. 535 (1974).

The trust obligation and responsibility of the United States to Indians has also led to the development of cannons of construction by this Court. Key cannons of construction important to this case include: "Doubtful expression must be resolved in favor of Indians who are the wards of the nation, dependent upon its protection and good faith", *McClanahan*, at 174; and that "statutes passed for the benefit of dependent Indian tribes are to be liberally construed, doubtful expressions being resolved in favor of the Indians", *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918). This Court has called these cannons of construction "eminently sound and vital", *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655 n.7 (1976). These cannons of construction have been instrumental in this Court's development of the doctrine of traditional Indian immunity from state taxation. *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976), and *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985).

B. States May Not Tax Indian Reservation Lands Or Indian Activities Carried On Within The Boundaries Of A Reservation In The Absence Of Specific Congressional Consent.

The premise that states may not tax Indian lands or activities within an Indian reservation is of judicial origin which this Court recognized and has developed over more than a century.

An early, significant case in which the issue of state taxation of Indians was presented is *The Kansas Indians*, 5 Wall 737 (1867). Here, this Court considered whether the state could impose a land tax on reservation Indians. The

Shawnee Tribe had located to a reservation and in addition to the tribal lands held in common, some of its members owned land in severalty. The Court rejected the state's efforts to impose a land tax upon the lands held in severalty primarily on the basis that:

> "If the tribal organization of the Shawnees is preserved intact, and recognized by the political department of the government as existing, then they are a 'people distinct from others' capable of making treaties, separated from the jurisdiction of Kansas, and to be governed exclusively by the government of the Union. If under the control of Congress, from necessity there can be no divided authority."

The Kansas Indians at 756.

Consistent with *The Kansas Indians* was this Court's judgment in *The New York Indians*, 5 Wall 761 (1867).

Twenty years after these cases were decided, Congress shifted into the allotment and assimilation era which was spearheaded by the General Allotment Act of 1887. For the next 40 years, Congressional policy was aimed at the elimination of tribal governments and reservations, and the assimilation of the individual Indians. The prevailing wisdom of Congress was that within a short time, a generation at most, the Indian reservation system would cease to exist. *Solem v. Bartlett*, 465 U.S. 463, 468 (1984).

When the miserable failures of the allotment and assimilation policies were finally confronted, Congress adopted the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. 461, *et seq.* With this legislation, Congress

rejected and repudiated allotment and assimilation policies. *Mattz v. Arnett*, 412 U.S. 481, 486 (1973). Congress replaced the repudiated policies with policies geared toward encouraging and strengthening tribal government, halting the alienation of tribal lands, and developing improvements to the tribal economic conditions, including reacquisitions and consolidation of tribal land holdings. See 25 U.S.C. 461, *et seq.*

Following the Congressional divorce from allotment and assimilation policies, there existed a certain degree of confusion and uncertainty by Indian tribes, and Congress for that matter, as to the extent of state power to levy taxes on Indian people within Indian reservations. See *Bryan v. Itasca County, supra,* at 391 and 392. The first post-assimilation case from this Court dealing with this issue was *Warren Trading Post v. Arizona Tax Comm.*, 380 U.S. 685 (1965). In this case, this Court invalidated a tax on the gross proceeds of sales by an Indian trader licensed by the United States who was doing business with Navajo people on the Navajo Indian Reservation. In so holding, this Court found that the state tax was preempted because it would frustrate federal purposes and could disturb and disarrange federal legislation.

Eight years after *Warren Trading Post*, this Court announced its landmark decisions in *McClanahan v. Arizona Tax Comm., supra,* and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). The analysis and reasoning of this Court in these cases, serves as the current foundation for the consideration of whether any form of state taxes are lawfully applied to reservation Indians and their lands. In *McClanahan*, this Court began its consideration of the validity of the disputed state income tax with the *Treaty*

With the Navajos, 15 Stat. 667. The pertinent portions of the Navajo Treaty are virtually the same as the Yakima Treaty. The Court then examined Arizona's disclaimer of jurisdiction inside Indian reservations in its Enabling Act, 36 Stat. 557, 569. Again, there is no significant difference between the Arizona Enabling Act and the Washington Enabling Act[9]. Relying on this "backdrop", the Court discussed and disposed of each of the state's contentions and concluded the opinion by stating:

> "However relevant the land-income distinction may be in other contexts, it is plainly irrelevant when, as here, the tax is resisted because the state is *totally* lacking in jurisdiction over both the people and the *lands* it seeks to tax. In such a situation, *the state has no more jurisdiction to reach income generated on reservation lands than to tax the land itself.*" (emphasis supplied)

McClanahan at 181.

The breadth of the *McClanahan* opinion was summarized in *Mescalero*, wherein this Court provided:

> "Even so, in the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, *there has been no satisfactory authority for taxing Indian reservation lands* or Indian income from activities carried on within the boundaries of the reservation." (emphasis supplied)

Mescalero at 148.

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[9] The Washington Enabling Act which contains a disclaimer by Washington over Indian lands not only serves as a portion of the "backdrop" for consideration of the preemption analysis, but also serves as a separate and independent basis to invalidate the challenged property tax, which argument is set forth hereinbelow.

After *McClanahan* and *Mescalero*, this Court decided *Bryan v. Itasca County, supra*, and responded to the argument that Public Law 280, 67 Stat. 589, conferred upon the states the requisite jurisdiction to tax reservation Indians. This Court answered that Pub. L. 280 did not confer such jurisdiction. In the opinion, Mr. Justice Brennan could find no intent from Congress to waive the Indians' traditional immunity from state taxation. Applying the cannons of construction applicable to Indian issues, a unanimous Court recognized that the enactments' express recognition of the non-taxability of trust property does not by implication authorize other forms of state taxation of reservation Indians. *Id.* at 390, 391. This is a concept that Yakima County and its supporters fail to appreciate. Congressional recognition of the tax-exempt status of trust lands *does not by implication* serve as affirmative consent to the state taxation of Indian-owned fee lands. This is the clear and resounding message from *Bryan*.

There have been a number of other cases in which this Court has applied the *McClanahan* principles. It would serve no purpose to retrace the Court's analysis of each case in which this Court struck down state taxation of reservation Indians.[10] However, one recent case contains a particularly poignant message from this Court that seems to summarize the law as to this issue. In *California v. Cabazon Band of Indians*, 480 U.S. 202, 215 n.17

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[10] Examples of such cases include *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1982); *Washington v. Colville Tribes*, 447 U.S. 134 (1980); and *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985).

(1987), Mr. Justice White summarized the status of the laws as follows:

> "In the special area of state taxation of Indian tribes and tribal members, we have adopted a per se rule. In *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985), we held that Montana could not tax the Tribe's royalty interests in oil and gas leases issued to non-Indian lessees under the Indian Mineral Leasing Act of 1938. We stated: "In keeping with its plenary authority over Indian affairs, Congress can authorize the imposition of state taxes on Indian tribes and individual Indians. It has not done so often, and the Court consistently has held that it will find the Indians' exemption from state taxes lifted only when Congress has made its intention to do so unmistakably clear." Id., at 765. We have repeatedly addressed the issue of state taxation of tribes and tribal members and the state, federal, and tribal interests which it implicates. We have recognized that the federal tradition of Indian immunity from state taxation is very strong and that the state interest in taxation is correspondingly weak. Accordingly, it is unnecessary to rebalance these interests in every case. In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973), we distinguished state taxation from other assertions of state jurisdiction. We acknowledged that we had made repeated statements "to the effect that, even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law. . . . Even so, *in the special area of state taxation*, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation; and *McClanahan*

> *v. Arizona State Tax Comm'n*, [411 U.S. 164 (1973)], lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent." Ibid.

The per se approach of this Court to issues of state taxation of reservation Indians is difficult to reconcile with the Ninth Circuit's determination that a *Brendale* balancing approach is the appropriate test. *Brendale* and its predecessor, *Montana v. United States*, 450 U.S. 544 (1981), involved jurisdictional disputes between tribal and state governments over regulatory authority applicable to *non-Indians on reservation fee lands*. The Ninth Circuit opinion cannot be supported by the Yakima Nation even though it was prepared to demonstrate the serious, detrimental impact of the County's taxes upon its political integrity, economic security and general welfare.

C. The Terms "Indian Country" And "Reservation Lands" Include Fee Lands Situated Within Reservation Boundaries.

When applying the *McClanahan* and *Mescalero* opinions to this case, an obvious concern that comes to mind is whether this Court would have distinguished fee lands from trust or restricted lands when using the broader language of "reservation lands". The Yakima Nation submits that in the context of *McClanahan* and *Mescalero*, the phrase "reservation lands" includes both trust lands and fee lands. As this may be the crux of the matter, further inquiry into what categories of lands comprised the general term "reservation lands" is warranted.

The opinions in *McClanahan* and *Mescalero* do not define "reservation lands". However, had this Court

intended to limit the reach and import of these opinions and statements regarding states authority to tax within recognized reservations, surely Mr. Justice Marshall and Mr. Justice White would have used the terms "trust" or "restricted" lands in their respective opinions. This supposition by the Yakima Nation is supported by the fact that Congress had in 1948 put an end to the confusion of what lands were considered "reservation lands" by establishing the definition for "Indian Country", 62 Stat. 757, 18 U.S.C. 1151. In this Congressional definition, "Indian Country" means in part:

> "(a) *all lands within the limits of any Indian reservation* under the jurisdiction of the United States Government, *notwithstanding the issuance of any patent* and, including rights of way running through the reservation, . . . " (emphasis supplied)

Mr. Justice Douglas in his separate opinion in *Mescalero*, acknowledged this Court's recognition of the term "Indian Country". *Id.* at 161.

Prior to the adoption of the 1948 definition, the term "Indian Country" arguably did not include unrestricted fee lands within a reservation or right-of-ways to which Indian title had been extinguished. See, *Dick v. United States*, 208 U.S. 340 (1908), *Clairmont v. United States*, 225 U.S. 551 (1912), and *Solem v. Bartlett*, *supra*, at 468. By providing "Indian Country" to include all reservation lands, notwithstanding the issuance of a fee patent, Congress eliminated jurisdictional differences depending on whether the land in question was fee or trust. This Court had confronted the import of the "Indian Country" definition of 18 U.S.C. 1151 some ten (10) years prior to

McClanahan and *Mescalero* in *Seymour v. Superintendent, supra.*

In later decisions, this Court has not limited the "Indian Country" definition at 18 U.S.C. 1151 strictly to questions of criminal jurisdiction, a position argued by Yakima County. This Court has explicitly recognized that 18 U.S.C. 1151 has a bearing upon questions of civil jurisdiction as well as criminal jurisdiction. See *DeCouteau v. District Court*, 420 U.S. 425, 426 n.2 (1975) and *California v. Cabazon Band of Indians*, at 207 n.5. Based on these authorities, it is inconceivable to the Yakima Nation that the words "reservation lands" which were used in the above-quoted passages from *McClanahan* and *Mescalero*, were limited in scope or meaning to restricted or trust lands.

D. 25 U.S.C. 349 Is Not Specific Congressional Consent To State Taxation Of Reservation Indian Fee Lands.

Yakima County and its supporters each argue that the per se rule of *McClanahan* is avoided as to the more specific issue of state taxation of Indian fee lands by Section 6 of the General Allotment Act, 25 U.S.C. 349. This same argument was previously presented to this Court by the State of Montana in *Moe v. Salish and Kootenai Tribes, supra*, and it was thoroughly rejected.

In *Moe*, this Court was confronted with the question of whether the State of Montana had requisite jurisdiction to impose and collect personal property taxes, particularly personal property taxes on motor vehicles, which were owned by members of the tribe residing on the

reservation. The Flathead Reservation is remarkably similar to the Yakima Reservation in size, population, and in ratio of Indian population to total population. A considerable amount of fee lands were owned by both tribal members and non-Indians as, unlike the Yakima Reservation where 80% of the land remains as trust, slightly more than half of the Flathead Reservation was fee land.

In order to avoid the application of *McClanahan* and *Mescalero*, the State of Montana argued by virtue of Section 6 of the General Allotment Act, Congress had granted states civil jurisdiction over Indians, including jurisdiction to impose personal property taxes. The state also relied on *Goudy v. Meath, supra*, a decision of this Court, which was made during the time allotment and assimilation policies were law, which held that the state taxing jurisdiction was among the laws to which an Indian patentee was made subject after receiving a conveyance of a fee patent pursuant to 25 U.S.C. 349. The state attempted to build on *Goudy* and the fact that the General Allotment Act has never been "repealed", claiming that Montana's taxing jurisdiction, at least on fee lands, had never been withdrawn and that such power continued to the present. *Moe* at 477.

Mr. Chief Justice Rehnquist (then Mr. Justice Rehnquist) writing for all members of the Court, rejected the state's arguments finding them "untenable". *Moe* at 478. The opinion then provides that state jurisdiction to impose personal property taxes on Indians living on fee lands would substantially diminish the Flathead Reservation in size, *a result contrary to the intent embodied in the existing federal statutory law of Indian jurisdiction*. The opinion then reminded Montana that the General Allotment

Act and related legislation of that era was founded on a policy of assimilation and abolishment of reservations in their entirety. And that such policies were repudiated by the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. 461, *et seq*. and complex intervening jurisdictional statutes directed at the reach of state law within reservation lands. *Moe* at 479.

The Yakima Nation fails to comprehend a meaningful distinction between the circumstances presented in *Moe* and those now before this Court. The statute in question, 25 U.S.C. 349, by unambiguous language clearly purports to subject Indians residing upon lands in fee to both the civil and criminal laws of the state in which they reside. However, the plain language of the statute and the obvious intent of Congress in 1887 and 1906, was discarded in *Moe* which teaches that the assimilation legislation of a bygone period of time must be examined critically with respect to recent Indian legislation and in light of the current policies of Congress.[11]

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[11] Since the *Moe* decision was handed down in 1975, Congress has passed numerous enactments with a core premise of encouraging and strengthening tribal self-government. Moreover, it is now the policy of Congress that Indian tribes must have a solid land base for economic development and housing needs. Examples of such Congressional findings and legislation include Indian Health Care Act of 1976, 90 Stat. 1400, 25 U.S.C. 1601, *et seq.*; Indian Child Welfare Act of 1978, 92 Stat. 3069, 25 U.S.C. 1901, *et seq.*; Indian Alcohol/Substance Abuse Act of 1986, 100 Stat. 3207, 25 U.S.C. 2401, *et seq.*; The Tribally Controlled School Act, 102 Stat. 385, 25 U.S.C. 2501, *et seq.*, wherein Congress found "Indians will never surrender their desire to control their relationships both among themselves

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Yakima County and its amici argue that while *Moe* may have invalidated the general jurisdiction granted to states by 25 U.S.C. 349, that the Burke Act (34 Stat. 182) proviso remains viable.[12] This argument simply cannot bear scrutiny. The legislative history for the Burke Act demonstrates it was passed specifically in response to *In Re Heff*, 197 U.S. 488 (1905) for two stated purposes. The first purpose was to delay conferring citizenship upon an Indian allottee, until the end of the trust period when a fee patent was issued. Supporters of the Burke Act believed that delaying citizenship was necessary because if an Indian became a citizen at the time of receiving his

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and with the non-Indian governments, organizations and persons"; Indian Gaming Regulation Act of 1988, 102 Stat. 2467, 25 U.S.C. 2701, *et seq*. wherein Congress found, "a principal goal of Federal Indian Policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government"; and the Native American Languages Act of 1990, 104 Stat. 1153, 25 U.S.C. 2901, *et seq*., wherein Congress found "special status is accorded Native Americans in the United States, a status that recognizes district cultural and political rights including the right to continue separate identities". Congressional acts for the purpose of expanding tribal land base include the Taos Pueblo Land Act, 84 Stat. 1437; Warm Springs Land Act, 86 Stat. 719; Siletz Tribe Land Act, 94 Stat. 1072; and Fallon Reservation Land Act, 92 Stat. 455.

[12] The County and its supporting amici attempt to bridge allotment and assimilation legislation over a gap of 50 years after Congressional repudiation. Contrary to the Amici Brief of the National Association of Counties, at p. 11, Congress has not recently amended an Allotment Act statute. 25 U.S.C. 373 is a Decent and Distribution Statute which came about by Act of June 25, 1910, 35 Stat. 855, approximately 23 years after the General Allotment Act was passed.

allotment in trust, states were placed in the awkward position of having jurisdiction over the Indian while having no jurisdiction over his property.[13] The second was to give the Secretary of the Interior the power to issue a fee patent and confer citizenship to an allottee prior to the end of the 25 year trust period when the Secretary deemed it was proper.[14] The legislative history is void of a suggestion that the Burke Act was intended to confer upon the states the ability to tax the fee patents. Congress did not voice a concern as to this question when considering the Burke Act as it was believed tribal governments and the reservation system would be destroyed and states would soon assume complete jurisdiction. *Solem v. Bartlett, supra,* at 468.

After reviewing this legislative history, the Yakima Nation asks, what Congressional purposes behind the Burke Act remain unrepudiated so as to give the Burke Act proviso to 25 U.S.C. 349 a vitality which survives the repudiation of the statutes original text? The idea that an Indian could not become a citizen until receiving a fee patent for his allotment has surely been repudiated. All Indians are citizens whether their property is trust or fee. Also, the authority granted to the Secretary of the Interior to issue a fee patent prior to the end of the 25 year trust

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[13] The ironic dichotomy of the present case is that Yakima County now argues the equally awkward position that states should have jurisdiction over a reservation Indian's fee land while not having general jurisdiction over the individual Indian.

[14] See Brief for La Plata County, Colorado, et al., as Amici Curiae in support of Yakima County, pages 22a through 26a, for this legislative history.

period is a concept totally repudiated and completely replaced by the statutes of the Indian Reorganization Act. Even the holding in *In Re Heff, supra,* was reversed by *United States v. Nice,* 241 U.S. 591 (1916). Each of the purposes behind the Burke Act Amendment to 25 U.S.C. 349 has been thoroughly rejected by Congress and replaced with other legislation. When the lessons of *Moe* are applied to the Burke Act Amendment to 25 U.S.C. 349, one is compelled to ask, how can the Burke Act legislation be any less repudiated than the general jurisdiction grants to states contained in the statute? Would not state jurisdiction to tax Indian-owned fee lands reduce the size of the Yakima Reservation to the Indian people as much, if not more[15], as state jurisdiction to impose other taxes?

The Yakima Nation submits the allotment legislation relied upon by the County has been effectively repudiated. In summary, the decision of Judge McDonald of the District Court correctly applied the *Moe* principles to this case.

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[15] A comparison of a general/personal property taxing jurisdiction versus real property taxing jurisdiction is not intended to suggest personal property tax issues are of lessor concern. However, a personal property tax liability may involve payments of money and at most, the seizure of personal property, for example, a vehicle. But the inability to pay real estate taxes may result in the forfeiture of one's home. The loss of the sanctity of a home to any family is catastrophic. Being at risk to loose your home on some lands of the Yakima Reservation and not others unquestionably reduces the size of the Yakima Reservation to the Yakima people.

E. Other Jurisdictions Considering This Issue Have Determined There Is No State Jurisdiction To Tax Indian-Owned Fee Lands.

In deciding to contest this issue and in its presentation of legal authorities to the District Court and the Ninth Circuit, the Yakima Nation has relied heavily on the opinion of the Arizona Supreme Court in *Battese v. Apache County, supra*. In *Battese*, the Arizona court had before it the identical issue now before this Court. That court concluded that Arizona had no lawful jurisdiction to tax fee lands owned by members of the Navajo Tribe within the Navajo Reservation. The Yakima Nation is not aware of any fact or circumstance which would permit a distinguishment of *Battese* with this dispute. The Arizona Court examined *McClanahan, Mescalero*, 18 U.S.C. 1151 and other authorities discussed in this brief and concluded that the state simply did not have the taxing jurisdiction.

Following *Battese*, the executive branches of at least three states determined that state taxation of Indian-owned fee lands was no longer lawful. In Idaho, Oregon and North Dakota taxation of Indian-owned fee lands within recognized reservations was discontinued.[16] Discontinuation of taxation of Indian fee lands has not bankrupted the states of Arizona, Idaho, Oregon and North Dakota. These states and the affected counties

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[16] Idaho Tax Comm., *Taxation Of Lands Within Indian Reservations Which Are Owned By Indians*, (June 8, 1982); Oregon Dept. of Justice, *Taxation Of Indian Fee Land*, (advice letter dated March 14, 1983); and N.D. Op. Attorney Gen. No. 85-12 (1985).

therein are no doubt providing essential governmental services. The amici supporting Yakima County have provided conclusionary statements to this Court with little or no supporting data regarding the dire need to tax the fee lands of the Indian tribes[17] and the Indian people. Before becoming caught up in the hysteria portrayed by supporters of Yakima County, one must remember that these same arguments were no doubt made prior to this Court's invalidation of the state income tax on tribal members in *McClanahan;* this Court's invalidation of the personal property taxes in *Moe*, this Court's invalidation of the vehicle excise taxes in *Washington v. Colville Confederated Tribes*, 447 U.S. 134 (1980); and the list goes on. The Yakima Nation submits that depriving 31 member families of their homes for non-payment of taxes to a government, which has no civil regulatory authority or jurisdiction[18] over them, is a considerably more tragic

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[17] Yakima County and the State of Washington's position that revenue needs require the taxation of tribal fee lands is baffling. State law provides property tax exemptions to more than 40 different categories of property. R.C.W. 84.36.010, *et seq*. The property of all other forms of government, including that of the United States, the counties, cities, towns, schools, irrigation districts, etc., is exempt. In spite of a state policy of exempting all other governmental entities from property taxes, Yakima County, the state, and the amici urge this Court to sustain taxes on the government of the Yakima Nation. The Yakima Nation submits that no rational distinction exists which would justify such a discriminatory position.

[18] The foremost example of a lack of civil regulatory jurisdiction involves the recent zoning dispute which was before this Court in *Brendale*. An issue in the parties' briefing was whether Yakima County could zone the fee lands owned by

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circumstance than the loss of some relatively insignificant tax revenues.

F. The Yakima Land Consolidation Statute, 25 U.S.C. 608 Demonstrates The Uncertainty As To Whether Fee Lands Are Taxable By The State.

This land consolidation statute has been cited by Yakima County as support for its position before this Court. A careful review of the statute and its history demonstrates that the County's argument should not be well taken. The original version of 25 U.S.C. 608 was a portion of an Act of July 28, 1955, 69 Stat. 392. Under the 1955 statute, the Secretary of the Interior was only authorized to purchase trust lands within the Yakima Indian Reservation for the Yakima Tribes.

By Act of August 31, 1964, 69 Stat. 392, Congress amended 25 U.S.C. 608, and expanded the land base from which such purchases could occur. The Secretary of the Interior was authorized to:

> "(1) purchase for the Yakima Tribes, with any funds of such tribes, and to otherwise acquire by gift, exchange, or relinquishment, any lands or interest in lands or improvements thereon within the Yakima Indian Reservation *or within*

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tribal members. However, Yakima County conceded in oral argument before this Court that it did not have jurisdiction to zone member-owned fee land. Brendale transcript of oral argument, p. 12. Moreover, the criminal jurisdiction of Yakima County is limited by 18 U.S.C. 1151, *et seq*. The Yakima people are governed locally by the Yakima Nation, a policy strongly supported by Congress.

> *the area ceded to the United States by the Treaty of June 9, 1855;"*

By virtue of the 1964 Act, the Yakima Nation could own fee lands both inside *and outside* the Yakima Reservation. The 1964 Act added a new section which read in pertinent part as follows:

> "(c) In all cases in which land being purchased is presently held by the grantor in fee simple, title shall be taken for and held by the Yakima Tribes in fee and such land shall not, by reason of its being owned by the tribes, be exempt from taxation in accordance with the laws of the State of Washington."

A couple of observations about this section of the 1964 Act need to be made. First, it is undeniably ambiguous and confusing. The legislation seems to have recognized a lack of tribal immunity from property taxes on fee lands (perhaps off-reservation fee lands) if the State had a specific statute attempting to tax tribally owned fee lands. However, no statute of the State from 1964 to the present, has sought to tax tribally owned fee lands. More importantly, the State does not have affirmative consent from Congress to tax fee lands. Congress could have easily provided, "and such lands shall be subject to state and local taxation," and affirmative consent would have existed.

As a final point, the 1964 Act did not provide a waiver of the Yakima Nation's traditional sovereign immunity from suit. A confrontation over non-payment of property taxes would have left the State in the embarrassing position of being unable to judicially enforce property taxes which may have been assessed. *Oklahoma Tax Comm. v. Citizen Bank Potawatomi*, 111 S.Ct. 905 (1991). The Yakima Nation submits that the quoted sentence reflects the general uncertainty and confusion which existed in 1964 as to state jurisdiction to tax

Indians inside reservations. This enactment occurred nine years prior to *McClanahan*. The Yakima Nation contends that a logical interpretation is that the quoted provision was neutral to reflect the fact that fee lands could be acquired both inside and *outside* the reservation, and that the fee lands owned outside the reservation could be taxable.

Recently, Congress put an end to the ambiguity. By Act of November 1, 1988, 104 Stat. 206, Section (c) of 25 U.S.C. 608 was amended and now reads as follows:

> "(C) Lands and interests in lands acquired by the Secretary pursuant to subsection (a)(1) and for the benefit of the Yakima Indian Nation pursuant to section 5 of the Act of June 18, 1934 (48 Stat. 985; 25 U.S.C. 465) shall be held in trust by the United States for the benefit of the Yakima Indian Nation."

With the new amendment, now, even fee lands acquired outside the reservation are not subject to state taxation. There is no further confusion or jurisdictional clumsiness. It is the clear policy of Congress that the Yakima Nation should pay no real estate taxes to the state and/or county, even on fee lands purchased outside the Yakima Reservation.

III. THE WASHINGTON ENABLING ACT AND THE STATE CONSTITUTION DO NOT PERMIT PROPERTY TAXATION OF FEE LANDS OWNED BY TRIBAL MEMBERS WITHIN A RESERVATION.

The Washington State Enabling Act, 25 Stat. 656 contains a disclaimer of jurisdiction over Indian Reservation lands. This provision of the Enabling Act is repeated in Article XXVI of the Constitution of the State of Washington. The Washington disclaimer is very similar to the

Arizona disclaimer which this Court found to be significant in *McClanahan*. In addition to being part of the "backdrop" pertinent to the preemption analysis discussed hereinabove, the Yakima Nation submits that the Washington disclaimer serves as independent authority to invalidate Yakima County's efforts to tax the reservation fee lands of enrolled tribal members. The relevant portion of the Washington Enabling Act reads as follows:

> "Does agree and declare that they forever disclaim all right and title . . . to all lands lying within said limits owned or held by an Indian or Indian tribe; and . . . said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States . . . and that no taxes shall be imposed by the state on lands or properties therein belonging to or which may hereafter be purchased by the United States or reserved for use; provided, *that nothing in this ordinance shall preclude the state from taxing as other lands are taxed, any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant,* save and accept such lands as may have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation, which exemption shall continue so long and to such extent as such act of Congress may prescribe." (emphasis supplied)

The Ninth Circuit considered this argument in its opinion. The Ninth Circuit determined that in spite of the clear disclaimer language that Congress could give its consent to states, including Washington, to tax the reservation fee lands of enrolled tribal members who have retained their tribal affiliations. The Ninth Circuit then

determined that 25 U.S.C. 349 manifested Congress' consent to such taxation. [Yak. Co. Pet., p. 9a-12a]

The Yakima Nation argues that 25 U.S.C. 349 was, at best, Congressional consent to states to tax the reservation fee lands of Indian people who had *severed* his or her tribal relations. Moreover, such consent was withdrawn in 1934 by the Indian Reorganization Act. As before, whether 25 U.S.C. 349 serves as such consent must be examined in light of the Congressional policy existing when the statute became law. As stated hereinabove, the disbandment of tribal organizations and the breaking up of Indian reservations were the goals and purposes of Congress in passing the General Allotment Act. Under the law of *The Kansas Indians, supra,* Congress knew in 1887 that "as long as the tribal organization is preserved intact", the Indians had a strong claim to total immunity from state taxation. As such, Congress was required to break up the reservations and destroy the tribes in order to confer jurisdiction to tax the Indians upon the states. The allotment legislation was intended to produce such results.

The Washington Enabling Act was nearly contemporaneous with the General Allotment Act. Examined together, the quoted section of the Washington Enabling Act permitting state taxation of Indians having severed their tribal relations, makes sense as within a generation, it was thought that the tribal organizations would be destroyed and all tribal relations severed. However, Congress discarded its allotment and assimilation policies prior to actual disbandment of the majority of tribal organizations and reservations. With the passage of the Indian Reorganization Act, Congress reversed itself and

began to encourage the tribal governments to, not only survive, but to become stronger and more active. Members of the Indian tribes were encouraged to maintain, not sever their tribal affiliations. Simply put, Congress could not have possibly contemplated that 25 U.S.C. 349 would serve as consent to the State of Washington to tax the reservation fee lands of Indians retaining tribal affiliation when it was believed that 25 U.S.C. 349 and the remainder of the General Allotment Act would soon break down and destroy tribal affiliations.

IV. YAKIMA COUNTY'S EFFORTS TO IMPOSE AND COLLECT THE REAL ESTATE SALES EXCISE TAX ON SALES OF FEE LAND BY THE TRIBE AND ITS MEMBERS ARE UNLAWFUL.

In the face of *McClanahan, Moe, Colville, Cabazon,* etc., Yakima County maintains the legally unsupported position that it can impose and collect an excise tax on the Yakima Nation and its members on sales of fee land within the Yakima Indian Reservation.

The statutory framework for the excise tax makes the tax the seller's obligation. See, R.C.W. 82.45.080. As pointed out by the Ninth Circuit, this tax is not a tax upon the property itself. *Mahler v. Tremper,* 40 Wn.2d 405, 409, 243 P.2d 627 (1952). The authorities cited by Yakima County do not support the concept that the tax is lawfully applied to reservation Indians. The case of *Oklahoma Tax Comm. v. United States,* 319 U.S. 598 (1943) was a case which this Court should limit in scope and to its particular facts. This was a dispute decided before Congress adopted its definition of "Indian Country". Moreover, the dispute was between the heirs of a deceased member of

one of Five Civilized Tribes of Oklahoma. This Court was unable to apply the rule of *The Kansas Indians* as the tribe in question had no effective tribal autonomy, and its members were citizens of the state with little to distinguish them from other state citizens. *Id.* at 603.

Yakima County also cites *Squire v. Capoeman*, 351 U.S. 1 (1956) to support its claim. This case is also out of context with the issues of the present controversy. *Squire v. Capoeman, supra,* concerned the issue of whether the income to an Indian allottee for the sale of timber was subject to *federal* taxes. In deciding that the income was exempt from federal taxes, this Court recognized that Congress in 1887 and again in 1906, intended that no taxation could be imposed on an Indian allottee until receiving the fee. It merits repeating that Congressional policy and intent as to the reach of state taxing jurisdiction of Indians inside reservations has changed, Congress having repudiated and rejected its assimilation and allotment legislation.

The fact that the tribe or a tribal member may sell reservation fee lands to a non-Indian cannot support the application of the tax. This issue has been foreclosed in the favor of the tribe by *Washington v. Colville Confederated Tribes, supra,* at 139. There, this Court recognized in the cigarette case that for tobacco products, the state excise tax fell upon the Indian retailer and not the non-Indian consumer. As a result, Washington's excise tax on tobacco product sales was invalid and not enforceable on reservation sales to non-Indians. This Court should affirm the ruling of the Ninth Circuit as to this issue.

CONCLUSION

The judgment of the Ninth Circuit should be reversed as to that portion of its opinion concerning taxation of the reservation fee lands. In reversing the Ninth Circuit, this Court should direct that a judgment be entered consistent with the opinion and judgment of Judge Alan A. McDonald of the District Court. This Court should affirm the Ninth Circuit as to that portion of its opinion concerning the excise tax, and in so doing, the Yakima Nation requests this Court to reaffirm the lessons from *Moe*, legal principals which are of vital importance to the survival of Indian tribes throughout the United States.

Respectfully submitted,

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